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No. 80-1929

IN THE
Supreme Court of the United States
OCTOBER TERM, 1980

THE BALTIMORE AND OHIO RAILROAD CO. AND
THE CHESAPEAKE AND OHIO RAILWAY CO.,
Petitioners

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITIONERS' REPLY MEMORANDUM

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PETITIONERS' REPLY MEMORANDUM

Having persuaded the Court of Appeals to ignore the district court's findings of fact, the Equal Employment Opportunity Commission ("EEOC") now seeks to avoid review of the decision below on two grounds: (1) lack of "prospective significance" due to changes in the law; and (2) the decision's "fact-specific" nature. This attempt must fail for the reasons set forth below.

1. Neither ground relied on by EEOC affects the undisputed circuit conflict on whether an "objective" or "subjective" good faith standard governs the "good faith reliance" defense available under Section 7(e) of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 626(e). Both the Second and District of Columbia Circuits have rejected the "objective" good faith standard applied by the court below and the Ninth Circuit. Pet. at 23-24. Rather, they have held that the " 'good faith' of the statute requires . . . only an honest intention to ascertain what the . . . Act requires and to act in accord-

ance with it."[1] Contrary to EEOC's contention, this issue presents a pure question of law since, as the district court noted, the government *at no point* contested the petitioners' "subjective" good faith reliance upon Department of Labor interpretations of Section 4(f)(2) of the ADEA. Pet. App. B at 39a.[2] Indeed, at least with respect to the lowering of the mandatory retirement age, EEOC's opposition implicitly concedes the Companies' subjective reliance on an opinion letter "generally supportive" of their actions,[3] a hardly surprising concession in view of the district court's finding that the letter in question "sanctioned . . . exactly what [the Companies] did." Pet. App. B at 39a-40a.

Moreover, EEOC cannot dispute the "prospective importance" of the "good faith reliance" defense issue. Regardless of the future validity of involuntary retirements, questions will arise as to whether employer actions otherwise violative of the ADEA qualify for the Section 7(e) exemption. In view of the recent increase in ADEA charges, such questions, most likely, will arise with even greater frequency.[4] Moreover, the importance of this issue extends beyond the ADEA since the exemption also

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[1] Addison v. Huron Stevedoring Corp., 204 F.2d 88, 93 (2d Cir.), *cert. denied*, 346 U.S. 877 (1953). *Accord*, Laffey v. Northwest Airlines, Inc., 567 F.2d 429, 464 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978).

[2] The Companies do not concede that their actions did not also satisfy an objective good faith standard as the district court found. Pet. App. B at 37a-40a. Indeed, since the district court adopted the same interpretation of the administrative materials as the Companies, there can be no doubt that the Companies acted in a reasonably prudent manner in relying on them.

[3] Opp. at 12.

[4] The Acting Chairman of the EEOC recently stated that charges filed under the ADEA had increased from 5400 in fiscal year 1979 to 8800 in fiscal year 1980, a rise of over sixty percent. Statement of J. Clay Smith, Jr., Acting Chairman of the EEOC, before Subcommittee on the Depts. of Commerce, Justice, State, the Judiciary and Related Agencies of the House Committee on Appropriations (March 11, 1981), at 10-11.

applies to the Fair Labor Standards Act, 29 U.S.C. §§ 201, *et seq.*, the Walsh-Healey Act, 41 U.S.C. §§ 35, *et seq.*, and the Davis-Bacon Act, 40 U.S.C. §§ 276a, *et seq.*,[5] while a similarly worded exemption is found in title VII, 42 U.S.C. § 2000e-12(b). This Court's intervention, therefore, is essential to insure uniformity on this important question of federal law.

2. Rather than refuting the Companies' contention that title VII standards are inapplicable, EEOC's opposition underscores the need for ADEA standards that will preclude the ADEA's application to responsible business decisions that were in no sense motivated by age animus. EEOC has always conceded that the Companies' actions were not based on age as such, but on the employees' entitlement to a pension and a continued source of income. Opp. at 6. Nonetheless, using a mechanical "but for" analysis, EEOC asserts that the Companies' actions were discriminatory *per se* because entitlement to this valuable fringe benefit was conditioned, in part, upon age. For support, EEOC relies on title VII case law striking down practices that were based on an impermissible criterion plus a nondiscriminatory factor, *i.e.*, the "sex plus" cases. Opp. at 6.[6]

EEOC's analysis, like that of the courts below, ignores one salient fact—unlike title VII, the ADEA explicitly sanctions employer action "based on reasonable factors other than age." ADEA § 4(f)(1), 29 U.S.C. § 623(f)(1). Accordingly, the fact that pension entitlement, rather than age, formed the basis for the Companies' action[7] should take the retirements outside the ADEA's scope. *City of McKeesport v. International As-*

[5] 29 U.S.C. § 259.

[6] Significantly, EEOC, like the Fourth Circuit, fails to offer any alternative to the Companies' reasoned and humane response to their economic crisis.

[7] Indeed, any sugestion that pension entitlement did not form the basis for the Companies' action would be disingenous since the parties expressly stipulated that fact prior to trial.

sociation of Firefighters, 399 A.2d 798, 799 (Pa. Commw. Ct. 1979). This conclusion is evident from this Court's recent explanation of the significance of the exclusion of the similarly worded Equal Pay Act defense from title VII:

> Title VII's prohibition of discriminatory employment practices was intended to be broadly inclusive, proscribing "not only overt discrimination but also practices that are fair in form, but discriminatory in operation." . . . The structure of Title VII litigation, including presumptions, burdens of proof, and defenses, has been designed to reflect this approach. *The [factor other than sex] defense of the Equal Pay Act, however, was designed differently, to confine the application of the Act to wage differentials attributable to sex discrimination.*

County of Washington v. Gunther, 49 U.S.L.W. 4623, 4626 (June 8, 1981) (citations omitted) (emphasis added).[8] The Court's intervention, therefore, is needed to insure recognition of this basic distinction between the ADEA and title VII.

Finally, even if title VII standards govern, the lower court's misapplication of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and its progeny still would mandate reversal. Contrary to the EEOC's assertion, the courts below held that *prima facie*, rather than *per se*, violations of the ADEA had been established. Pet. App. at 6a, 29a. Nonetheless, neither court considered whether the nondiscriminatory motives articulated by the Companies were sufficient to rebut that *prima facie* showing. Their failure to do so, whether viewed as error

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[8] Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702 (1978), relied on by EEOC, supports this view. There, the Court did not hold that the "factor other than sex" defense was unavailable because sex was one factor considered by the employer in requiring female employees to make larger contributions to a pension fund. Rather, it based its holding on the fact that sex was the *only* factor considered. 435 U.S. at 712-713. The decision thus indicates that consideration of an impermissible criterion is not fatal to the defense so long as that criterion, as here, does not form the basis for the employer's action.

under ADEA § 4(f)(1) or under *McDonnel Douglas*, not only rendered irrelevant the Companies' nondiscriminatory motivation, but also imposed upon them a burden of rebuttal far in excess of that permitted under *Texas Department of Community Affairs v. Burdine*, 49 U.S.L.W. 4214 (March 4, 1981).[9]

3. EEOC's suggestion that the 1978 amendments to the ADEA have deprived the Section 4(f)(2) issues of prospective significance is both incorrect and disingenuous. Those amendments have no impact on the various issues raised concerning the proper interpretation of the language of Section 4(f)(2). Rather than altering the exemption's language, the amendments simply added a clause to Section 4(f)(2) making it inapplicable to involuntary age-based retirements. Thus, the interpretation questions raised will be recurring, albeit outside the retirement context.

Nor can the continued significance of those issues to pre-1978 retirements be lightly disregarded. As EEOC is well aware, there still remain numerous pending and potential lawsuits involving the legality of pre-1978 retirements, one of which is also pending before this Court on a petition for certiorari.[10] The potential liability faced by employers is massive. Not surprisingly then, as late as July 28, 1981, EEOC itself viewed this area of sufficient significance to promulgate an interpretation of Section 4(f)(2) which addresses the applicability of the

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[9] That EEOC supports such analysis is hardly surprising in light of its interpretation of Section 4(f)(1), issued on July 28, 1981. That interpretation would require an employer to prove affirmatively, rather than simply articulate, a reasonable factor other than age for his actions. 29 C.F.R. § 1625.7(e), *as reported in* 353 BNA Pension Reporter (Aug. 3, 1981) (unpublished, to be codified), at R-26.

[10] That case, EEOC v. Eastern Airlines, Inc., No. 79-3960 (5th Cir., Apr. 14, 1981), *petition for cert. filed*, 50 U.S.L.W. 3013 (July 28, 1981), involves a Section 4(f)(2) issue virtually identical to that here presented concerning the proper interpretation of the term "subterfuge" in the post-ADEA context. Pet. at 22-24.

1978 amendments to pre-1978 retirements. Despite having lost the issue in all five Courts of Appeals that have considered it,[11] EEOC adhered to the position that the 1978 amendments invalidated retirements effected prior to the amendments' enactment. 29 C.F.R. § 1625.9(b)(1), *as reported in* 353 BNA Pension Reporter (Aug. 3, 1981) (unpublished, to be codified), at R-27. Accordingly, EEOC's own recent actions belie its suggestion that this is an area without "prospective importance." Moreover, those actions, like the complete disregard of the official ADEA interpretations on which the Companies relied, evidence the administrative lawlessness that employers have been subjected to in this area.

That EEOC would attempt to avoid resolution of the Section 4(f)(2) issues underscores its inability to counter the Companies' contentions on the merits. EEOC's entire "observe the terms" argument is that the terms of the plans did not authorize involuntary early retirement. That argument, based on a single sentence of testimony seized out of context, is wholly specious. It ignores not only the district court's finding to the contrary,[12] but also the parties' stipulation that the retirements were made on the basis of pension entitlement. To suggest now that the retirements were made on the basis of entitlement to a pension, but were not authorized by the plans, is absurd. Indeed, not a single retiree has has ever questioned the Companies' authority, apart from the ADEA, to require their early retirement.

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[11] EEOC v. Shell Oil Co., 637 F.2d 683 (9th Cir. 1981); Sikora v. American Can Company, 622 F.2d 1116 (3rd Cir. 1980); Jensen v. Gulf Oil Refining & Marketing Co., 623 F.2d 406 (5th Cir. 1980); Carpenter v. Continental Trailways, 635 F.2d 578 (6th Cir. 1980); Smart v. Porter Paint Co., 630 F.2d 490 (7th Cir. 1980).

[12] Pet. App. at 32a-33a, 37a. Rather than a single sentence of testimony, the district court's finding that the plans authorized involuntary early retirement was based on the terms of the plans themselves construed against extensive evidence of the plans' historical operation.

Even apart from this fact, EEOC's argument wholly misses the point. As the Companies demonstrated, to the extent the Fourth Circuit found irrelevant the historical practice relied on by the district court in construing the plans' terms, the decision below is in direct conflict with *United Air Lines, Inc. v. McMann*, 434 U.S. 192 (1977), *Aldendifer v. Continental Air Lines, Inc.*, 25 Empl. Prac. Dec. ¶ 31,535 (9th Cir. 1981), and *EEOC v. Shell Oil Co.*, 637 F.2d 683 (9th Cir. 1981). Those decisions interpreted plan language at least as ambiguous as that in the Companies' plans to authorize involuntary age-based retirement on the basis of the plans' historical operation. See, Pet. at 15-16. On the other hand, to the extent the Fourth Circuit refused to credit the district court's factual finding that the Companies "always had the power to involuntarily retire their employees under a consistent application of their plans," [13] its holding runs afoul of Rule 52(a), Fed. R. Civ. Proc. Pet. at 25-26. Finally, to the extent the Fourth Circuit's holding was based on the view that Section 4(f)(2) was unavailable due to the discretionary nature of the retirements, its holding conflicts with the five other circuits that have considered the issue. Pet. at 19. EEOC's argument simply fails to address any of these contentions.

In any event, EEOC's suggestion that plan authorization was lacking is wholly irrelevant. As the Companies demonstrated on the basis of Section 4(f)(2)'s legislative history, no such authorization is required. Pet. at 17-18. Rather, since an employer's right to separate an employee is never derived from a pension plan, the "observe the terms" requirement, properly construed, requires simply that an employer honor an employee's pension rights and pay the benefits provided by the plan. *Id.* This the Companies plainly did.

The "subterfuge" arguments advanced by EEOC to avoid review are even less convincing. As a threshold matter, it is important to recognize that a circuit con-

[13] Pet. App. at 37a.

flict, unaddressed by EEOC, exists on the question of whether a plan paying substantial benefits can ever constitute a "subterfuge." *Compare Zinger v. Blanchette*, 549 F.2d 901 (3rd Cir. 1977), *cert. denied*, 434 U.S. 1008 (1978), *and Marshall v. Hawaiian Tel. Co.*, 575 F.2d 763 (9th Cir. 1978), *with* decision below. That standard, which Justice White recognized as the proper test in his concurring opinion in *McMann*,[14] obviously mandates reversal of the Fourth Circuit's ruling.

Moreover, even among those circuits that have rejected the "substantial benefit" standard, there is a significant conflict on the type of proof an employer must advance to demonstrate that a post-ADEA plan is not an impermissible "subterfuge." As the Companies' petition notes, the Sixth Circuit in *Carpenter v. Continental Tailways*, 635 F.2d 578 (6th Cir. 1980), held that an employer need show only that his plan constituted a "legitimate instrument" established to provide benefits for his employees. That decision clearly conflicts with the decision below. Furthermore, it conflicts with both decisions relied on by EEOC—*EEOC v. Eastern Air Lines, Inc., supra*, and *Smart v. Porter Paint Co., supra*. Those decisions do little more than resurrect in the post-ADEA retirement plan context,[15] the business justification requirement rejected by this Court for pre-Act plans in *McMann*.[16] That requirement, of course, renders Sections

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[14] United Air Lines, Inc. v. McMann, 434 U.S. at 207 (White, J., concurring).

[15] The Companies do not concede that their plans are post-ADEA plans for purposes of Section 4(f)(2). In finding that the plans did not constitute a "subterfuge," the district court treated them as pre-ADEA plans despite the post-ADEA reduction in the retirement age since: (1) they predated the ADEA and paid substantial benefits; (2) the benefit levels of the plans had been improved in connection with the age reduction; and (3) the age reduction was merely a codification of the Companies' historic power to retire its employers involuntarily. Pet. App. at 36a-37a.

[16] In any event, neither Smart v. Porter Paint Co., *supra*, nor EEOC v. Eastern Air Lines, Inc., *supra*, support the decision below. In indicating that an employer could avoid a subterfuge

4(f)(1) and 4(f)(2) redundant since an employer has no need to rely on Section 4(f)(2) if his action is based on a reasonable factor other than age. Accordingly, this Court should grant certiorari not only to remove the confusion in this area, but also to insure a meaningful interpretation of each provision of the statute.[17]

4. EEOC's repeated suggestion that the instant case is too fact-specific to warrant review is wholly without merit. Whatever validity that suggestion might have in another context, it can have none where, as here, a Court of Appeals' actions have made a mockery of the "clearly erroneous" standard. As demonstrated in the Companies' petition, the Fourth Circuit disregarded, without finding "clearly erroneous," key factual determinations made by the district court on the actual operation of the pension plans, the Companies' motives in engaging in the challenged actions, and the Companies'

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finding on the basis of legitimate business reasons, they necessarily rejected the Fourth Circuit's view that any post-ADEA action inconsistent with the ADEA's goals necessarily constituted a "subterfuge." Pet. at 19-20. Moreover, while both cases arose outside the context of an economically necessary force reduction, and thus, are distinguishable factually, *Smart* did discuss the instant case and suggest that the "extensive evidence of a business purpose [advanced] for lowering the normal retirement age" was sufficient to avoid a "subterfuge" finding. Smart v. Porter Paint Co., 630 F.2d at 496, n.4.

[17] The decisions relied on by the EEOC to support the position that an employer cannot reduce his workforce by terminating older employees—McCorstin v. U.S. Steel Corp., 621 F.2d 749 (5th Cir. 1980) and EEOC v. Sandia Corp., 639 F.2d 600 (10th Cir. 1980)—are inapposite. In neither case was the question of whether the employer's actions were exempt under Section 4(f)(2) before the court. While *McCorstin* did suggest in dicta that Section 4(f)(2) was unavailable, it did not do so on the ground that such use of a pension plan constituted an impermissible "subterfuge." Rather, its suggestion was based on the view, now discredited in the Fifth Circuit and elsewhere, that retirements effected at an employer's option were not exempt under Section 4(f)(2). See, e.g., Jensen v. Gulf Oil Refining & Marketing Co., 623 F.2d 406 (9th Cir. 1980). Thus, both decisions hold simply that a dicharge effected on the basis of age violates the ADEA in the absence of an exemption.

good faith reliance upon official administrative interpretations of the ADEA. Pet. at 24-26. To now refuse review because of the factual complexity injected into this case by the disregard of such findings would not only reward the Fourth Circuit for its non-compliance with Rule 52(a), Fed. R. Civ. Proc., but also permit appellate courts to shield review of any controversial decision by simply substituting their own factual judgments for those of the district court.

CONCLUSION

For the reasons stated herein as well as those stated in the Companies' petition for a writ of certiorari, this Court should grant the petition.

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